UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PHILIP NAPIER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 97-123-P-H***
	)	
TOWN OF WINDHAM, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action arises out of the arrest of the plaintiff, Philip Napier, on April 19, 1995 by two of the defendants, Ronald Ramsdell and Richard Ramsdell, a sergeant and an officer, respectively, with the Windham Police Department. The other defendants are Richard Lewsen, the chief of police, and the Town of Windham. All of the defendants have moved for summary judgment on all counts of the amended complaint. I recommend that the motion be granted.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token,

'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed facts are appropriately supported in the summary judgment record.[1] In response to one or more telephone calls on April 19, 1995 to the Windham, Maine police

[1] Much of the defendants' Statement of Material Fact in Support of Motion for Summarty [sic] Judgment by the Town of Windham Defendants (Docket No. 13), submitted pursuant to this court's Local Rule 56, relies on the reported decision of the Law Court in *State v. Napier*, 1998 ME 8, 704 A.2d 869 (Me. 1998) as the source of support for its factual assertions. This method is inappropriate under the local rule and under Fed. R. Civ. P. 56, both of which require the material supporting a motion for summary judgment to be presented in pleadings, depositions, answers to interrogatories, admissions and affidavits. The opinion of an appellate court would not be admissible as evidence at trial in this action. I have relied on the transcript of the testimony from the state-court trial rather than the Law Court's opinion in fashioning this statement of the factual background of this case.

reporting that the plaintiff was firing a weapon at his home on the Highland Lake Shore Road, Windham police officer Richard Ramsdell ("Richard") went to investigate. Testimony of Patricia Anne Walters, Transcript of Proceedings, *State of Maine v. Philip Napier*, Superior Court (Cumberland County), Docket No. 95-1074, Volume II ("Tr. II"), at 24-36; Testimony of Eric Winslow Thomsen, Tr. II at 42-43; Testimony of Richard K. Ramsdell, Tr. II at 72-76. While en route, Richard was informed by the police dispatcher that the plaintiff might be "1044," a code for "mentally unstable." *Id*. at 76. Upon arrival, Richard parked his police cruiser at the end of the plaintiff's driveway and approached the house on foot. *Id.* at 80-81. Richard moved around the house but did not encounter the plaintiff. *Id*. at 83, 86-88, 93.

Sergeant Ronald Ramsdell ("Ronald"), Richard's brother, *id*. at 88, then arrived at the plaintiff's house, *id*. at 94. Richard walked toward the open front door of the house. *Id*. at 95. Richard called to the plaintiff at least twice as he approached, identifying himself as a police officer. *Id*. at 96; Testimony of Ronald Allen Ramsdell, Transcript of Proceedings, *State of Maine v. Philip Napier*, Superior Court (Cumberland County), Docket No. 95-1074, Volume III ("Tr. III"), at 16. The plaintiff states that he heard nothing. Affidavit of Phillip Napier ("Plaintiff's Aff.") (Docket No. 21) ¶ 8. Looking into the house, Richard saw a rifle lying on a table.[2] Tr. II at 99. The plaintiff came out of a side room carrying a gun. *Id*. at 102; Plaintiff's Aff. ¶ 7. Richard and Ronald testified that Richard shouted "Police, drop the gun" more than one time. Tr. II at 102-03; Tr. III at 16, 18. The plaintiff continued to walk toward the front door. Tr. II at 103; Plaintiff's Aff. ¶¶ 8-12.

[2] The plaintiff argues that, while a rifle was in fact lying on a table in view from the front door, Richard could not have identified it as such because the light at that time of day (between 6 and 7 p.m. on an April day) in a heavily wooded area would obscure the vision of a person standing outside a building looking inside. Plaintiffs [sic] Statement of Material Fact as to Which There are Genuine Issues to be Tried ("Plaintiff's SMF") (Docket No. 20) at 5-6.

Richard then jumped over a woodpile on the porch of the house. Tr. II at 104; Plaintiff's Aff. ¶ 10. He knocked a log off the pile. Tr. II at 145. Richard fired a shot at the plaintiff from his position behind the woodpile. *Id*. at 106. From a position in the driveway, Ronald then fired two bursts of three shots each at the plaintiff. Tr. III at 16-19, 20-21. Before firing the first three rounds, Ronald "hollered" three times: "Police, drop the gun." Tr. III at 21. The plaintiff turned to face Ronald between the two bursts. *Id*. at 20-21. The plaintiff was struck and injured by one or more of the rounds fired by Ronald. *Id*. at 50. He fell onto a bed next to the front door. Plaintiff's Aff. ¶ 14. Richard and Ronald then entered the house and placed handcuffs on the plaintiff, who was then treated by a doctor and a rescue unit. Tr. II at 113-14; Tr. III at 24-25. Defendant Lewsen, the chief of police in Windham, had no direct involvement in these events. Deposition of Richard B. Lewsen, Jr. ("Lewsen Dep."), at 2, 42.

The plaintiff was indicted on five charges arising out of these events: (i) recklessly creating a substantial risk of serious bodily injury to Richard; (ii) intentionally or knowingly placing Richard in fear of imminent bodily injury with the use of a firearm; (iii) discharging a firearm within 100 yards of a dwelling; (iv) intentionally or knowingly placing Ronald in fear of imminent bodily injury with the use of a firearm; and (v) recklessly creating a substantial risk of serious bodily injury to Ronald. Transcript of Proceedings, *State of Maine v. Philip Napier*, Superior Court (Cumberland County), Docket No. 95-1074, Volume I, excerpts presented in Addendum to Plaintiff's SMF accompanying Plaintiff's Statement of Corrected Citations (Docket No. 22), at 6-8. After a trial, the plaintiff was found guilty of the first three charges and acquitted on the last two. Transcript of Proceedings, *State of Maine v. Philip Napier*, Superior Court (Cumberland County), Docket No. 95-1074, Volume V, excerpt presented in Addendum to Plaintiff's SMF, at 6-7. Napier's appeal from

these convictions was denied. *State v. Napier*, 1998 ME 8, 704 A.2d 869 (Me. 1998).

III. Discussion

The amended complaint (Docket No. 2) asserts claims under 42 U.S.C. § 1983, specifying the Fourth Amendment as the source of the constitutional right allegedly violated by the defendants, and state-law tort and statutory claims. Specifically, the amended complaint raises claims against the Ramsdells under section 1983 and state-law claims of battery, assault, negligence, and violation of Article 1 of the Maine Constitution, a claim asserted pursuant to the Maine Civil Rights Act; claims against defendant Lewsen on the ground of supervisory liability under section 1983, for battery, assault and negligence, and for the state-law civil rights violation; and against the defendant town for inadequate training and supervision under section 1983, for "vicarious corporate liability," and for the state-law civil rights violation.

A. The Ramsdell Defendants

1. The Federal Claim (Count I). Count I is based on the Fourth and Fourteenth Amendments to the United States Constitution. The Ramsdell defendants contend that they did not violate any of the plaintiff's constitutional rights because they "were compelled to used deadly force by virtue of [the plaintiff's] own conduct." Motion for Summarty [sic] Judgment by the Town of Windham Defendants ("Defendants' Motion") (Docket No. 12) at 4. In the alternative, they assert that they are entitled to qualified immunity from the claim raised by the plaintiff under the circumstances of this case. They rely on existing federal case law and the doctrine of collateral estoppel, arguing that the final judgment of conviction in the state criminal action precludes any judgment in favor of the plaintiff in this action.

The parties agree that the factual circumstances in this case give rise to a claim of violation of the Fourth Amendment. Essentially, the plaintiff claims that the defendants used excessive force in the course of arresting him or conducting an investigation of his activities. *See Graham v. Connor*, 490 U.S. 386, 388 (1989). When those charged with the use of excessive force in this context assert a defense of qualified immunity, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id*. at 396-97.

Before reaching the qualified immunity analysis, it is necessary to identify the particular right allegedly violated. *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1714 n.5 (1998). The defendants contend that they violated none of the plaintiff's constitutional rights because he was convicted by a state court jury of criminal threatening toward Richard as a result of the events that give rise to this action. This means, according to the defendants, that Richard was placed in fear of imminent bodily injury by the plaintiff and that both Richard and Ronald were entitled to use deadly force against the plaintiff as a result. The defendants cite *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994), in support of their position.

In *Roy*, the plaintiff brought an action against three police officers, their chief, and the town that employed them under section 1983, alleging that the officers had unreasonably used deadly force against him. *Id*. at 693. The officers had been sent to investigate a report of domestic violence at the plaintiff's residence. *Id.* The officers were told that the plaintiff was armed with two knives and

had threatened to use them against any police officer who approached him. *Id.* The plaintiff was found lying on the ground at the back of the residence, was roused, and refused to accept service of a summons from a third officer who arrived independently of those responding to the domestic violence call. *Id*. The plaintiff went inside the residence and returned carrying a steak knife in each hand. *Id*. The officers drew their guns and ordered the plaintiff to put down the knives. *Id*. Inside, he advanced, flailing his arms. *Id*. The officers retreated and repeated their warnings and "made some effort to distract and disarm" the plaintiff. *Id*. When the plaintiff lunged toward two of the officers, one of the officers shot him twice, injuring him badly. *Id*. The plaintiff stated in an affidavit that he was seeking to put the knives down when he was shot. *Id.* Like the plaintiff here, Roy was prepared to offer an expert who would testify that the police conduct was unreasonable. *Id*. at 694. Determining that a jury could not find that the shooting officer's conduct was so deficient that no reasonable officer could have made the same choice under the circumstances, and noting the Supreme Court's generous standard of reasonableness when a police officer is faced with exigent circumstances, the First Circuit held that the officer's conduct was not unconstitutional. *Id*. at 695-96.

Of course, the factual situation in the case at hand is not identical to that presented in *Roy*. In addition, the defendants' assertion that the plaintiff's conviction in state court determines the necessary facts to establish their entitlement to qualified immunity, unsupported by any citation to authority, requires further discussion. If a judgment in favor of the plaintiff would necessarily imply the invalidity of his state-court conviction, the complaint must be dismissed. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). However, if the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against him, the action should be allowed to

proceed in the absence of some other bar to the suit. *Id.* The defendants' position in this case requires application of the doctrine of collateral estoppel, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This principle is fully applicable to a former judgment in a criminal case. *Id.* When the previous judgment is one of acquittal, the court must examine the record of the prior proceeding to determine whether a rational jury could have grounded that verdict upon an issue other than that which the former criminal defendant seeks to foreclose from consideration. *Id.* at 444. The latter point is important here because the plaintiff seeks a preclusive effect from the fact that he was acquitted in state court of the two charges involving Ronald.

Under Maine law, a "prior criminal conviction conclusively establishes all facts essential to the final judgment of conviction." *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 160 (Me. 1983). The convicted party is precluded from relitigating the issues essential to that conviction in subsequent civil actions. *Beale v. Chisholm*, 626 A.2d 345, 347 (Me. 1993). This is also true of federal actions brought pursuant to section 1983 when there is an underlying state-court conviction. *Allen v. McCurry*, 449 U.S. 90, 102, 105 (1980), *Glantz v. United States*, 837 F.2d 23, 25 (1st Cir. 1988). The preclusive effect of a state-court judgment in a subsequent federal proceeding is determined by the law of the state in which the judgment was rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985). The plaintiff contends that the only issue relevant to this proceeding that was determined in his criminal trial was that he was not justified in regarding Richard as a criminal trespasser. The objective reasonableness of the officers' conduct, he asserts, was not an essential element of the charge of criminal threatening.

The plaintiff was convicted of two crimes concerning his actions toward Richard on the date in question: criminal threatening with a dangerous weapon and reckless conduct with a dangerous weapon. "A person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury." 17-A M.R.S.A. § 209(1). In order to convict a defendant of this crime, it is not necessary for the prosecution to prove that the victim's fear was objectively reasonable. *State v. Thibodeau*, 686 A.2d 1063, 1064 (Me. 1996). "A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person." 17-A M.R.S.A. § 211(1). The facts essential to those convictions, which under Maine law must be taken as established in this proceeding, are that the plaintiff placed Richard in fear of imminent bodily injury and that he recklessly created a substantial risk of serious bodily injury to Richard, both by use of a gun.[3] While the state-court convictions do not themselves establish that Richard's fear of imminent bodily injury was objectively reasonable, the facts do support a conclusion that Richard's actions in response to the plaintiff's conduct — attempting to find cover while firing one shot in the direction of the plaintiff — were objectively reasonable, because a jury could not find that Richard's conduct was so deficient that no reasonable officer could have made the same choice under the circumstances. *Roy*, 42 F.3d at 695-96.

The plaintiff was acquitted in the state-court proceeding of the same charges with respect to Ronald, who apparently contends that witnessing the creation by the plaintiff of a substantial risk of

[3] The conviction on the reckless-conduct charge renders irrelevant the plaintiff's contention that Richard must prove that an objectively reasonable person in his position would have felt fear in order to make his response objectively reasonable. Plaintiff's Objection and Incorporated Memorandum of Law Opposing Summary Judgment ("Plaintiff's Memorandum") (Docket No. 19) at 15. The established fact is that the plaintiff created a substantial risk of serious bodily injury to Richard. His fear or its reasonableness is irrelevant to the question whether his response to that risk was objectively reasonable.

serious bodily injury to Richard was enough to make his conduct — shooting at the plaintiff six times, in two bursts of three shots — objectively reasonable. Ronald testified that he shot the first three rounds because he thought the plaintiff was going to shoot Richard. Tr. III at 21. He testified that he shot the next three rounds because he "felt [the plaintiff] was going to shoot me." *Id*. Contrary to the plaintiff's argument, his acquittal on the charges of criminal threatening and reckless conduct with regard to Ronald does not necessarily mean that the jury determined that Ronald's use of force against the plaintiff was excessive. It simply means that the jury rejected Ronald's conclusion that the plaintiff placed him in fear of imminent bodily injury or created a substantial risk of serious bodily injury to him. The relevant inquiry here is whether Ronald's conduct was so deficient that no reasonable officer could have made the same choice under the circumstances.

With respect to Ronald's witnessing of the plaintiff's creation of a substantial risk of serious bodily injury to Richard, I conclude that the *Roy* standard is met. A reasonable officer could have made the same choice under the circumstances. This conclusion reaches only Ronald's first three shots. Given the very short period of time involved , the plaintiff's failure to drop his gun, and the fact that the plaintiff does not contend that he did not hear Richard's and Ronald's repeated orders to drop his gun, the fact that the plaintiff contends that he did not raise his gun when he turned toward Ronald after the first three shots, in contrast to Ronald's testimony, is not determinative. In *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995), a police officer, dressed in jeans and a t-shirt, approached the plaintiff's car, with his gun drawn, in the process of executing a search warrant. *Id.* at 22-23. It appeared to the officer that the plaintiff reached for his own gun. *Id*. at 23. The officer fired, hitting the plaintiff in the neck and paralyzing him. *Id.* The parties disputed whether the police had identified themselves before the shot was fired. *Id.* The First Circuit held

that "[t]he judgment [the officer] made in that split second was at the very least reasonable, and it is not the role of the court to second-guess the decision." *Id*. at 28. It affirmed the district court's entry of summary judgment in favor of the officer. *Id.* at 29.

The facts of *St. Hilaire* and *Roy* are functionally indistinguishable from those presented here. The Ramsdell defendants are entitled to summary judgment on Count I.[4]

2. The State-Law Claims (Counts IV & VI). Count IV of the amended complaint alleges that the Ramsdell defendants are liable under Maine common law and the Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq*., for the harm inflicted as a result of: (i) their negligent performance of their duties, including their negligent use of deadly force; (ii) battery as a result of the shots that hit the plaintiff; and (iii) assault as a result of the shots that did not hit the plaintiff. The defendants contend that they are entitled to absolute immunity under 14 M.R.S.A. § 8111(1) because their actions constituted discretionary functions and were undertaken in the course and scope of their employment. The plaintiff does not respond to this argument. He has therefore abandoned this claim by failing to respond to the motion for summary judgment on this issue. *Reed Paper Co. v.*

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[4] The plaintiff also argues that the question of the objective reasonableness of the defendant officers' conduct must extend beyond the actual use of their guns to the "entire chain of events leading up to the use of force." The plaintiff suggests that "[t]he larger context is necessary to prevent the police from invoking exigencies of the moment created by their own unreasonable conduct as justification for inflicting deadly force that, but for their blunders, would never have been used." Plaintiff's Memorandum at 4. In *Diaz v. Salazar*, 924 F. Supp. 1088 (D.N.M. 1996), the plaintiff claimed that the defendant police officers' actions in creating a "dangerous situation" that resulted in the shooting of the plaintiff by one of the officers provided the basis for a Fourth Amendment violation. *Id*. at 1095. The court, in a well-reasoned opinion, concluded that the officers could not be liable under section 1983 for negligent conduct that created an allegedly dangerous situation prior to the seizure of the plaintiff. *Id*. at 1095-97. I find that reasoning persuasive. Any negligent acts by the Ramsdell defendants that precipitated the confrontation with the plaintiff are not actionable under section 1983. *See Sevier v. City of Lawrence*, 60 F.3d 695, 699 n.7 (10th Cir. 1995), *citing Daniels v. Williams*, 474 U.S. 327, 331-33 (1986).

Procter & Gamble Distrib. Co., 807 F. Supp. 840, 850 (D. Me. 1992). In light of this waiver, *see* Local Rule 7(b), the Ramsdell defendants are entitled to summary judgment on Count IV. Even if the plaintiff had not abandoned this claim, the Ramsdell defendants would be entitled to immunity under 14 M.R.S.A. § 8111(1). *Hegarty v. Somerset County*, 848 F. Supp. 257, 269-70 (D. Me. 1994), *rev'd in part on other grounds*, 53 F.3d 1367 (1st Cir. 1995).

Count VI is based on the Maine Civil Rights Act, 5 M.R.S.A. § 4682, invoking Article 1 of the Maine Constitution.[5] The Maine Civil Rights Act is patterned after section 1983. *LaPlante v. United Parcel Svc., Inc.*, 810 F. Supp. 19, 22 (D. Me. 1993). The qualified immunity analysis applicable to claims under section 1983 also applies to claims under the Maine Civil Rights Act. *Jenness v. Nickerson*, 637 A.2d 1152, 1159 (Me. 1994). Accordingly, the Ramsdell defendants are entitled to summary judgment on Count VI on the same basis on which they are entitled to summary judgment on Count I.

B. Defendant Lewsen

1. The Federal Claim (Count III). Count III of the amended complaint asserts that defendant Lewsen is liable to the plaintiff under section 1983 on a theory of supervisory liability. He expands on this claim in his memorandum by alleging that Lewsen has the authority to decide what types of training the members of his department are to receive and his failure to make policy and provide training constitutes an affirmative link to the alleged violations of the plaintiff's constitutional rights by the Ramsdell defendants such that Lewsen may be held liable under section 1983. Plaintiff's

[5] The plaintiff does not address this count in his objection to the motion for summary judgment.

Memorandum at 21.

It is well-established that supervisory liability under section 1983 cannot be premised on a theory of *respondeat superior*, but can only be based on the supervisor's own acts or omissions. *Sanchez v. Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996). A state or municipal official may be held liable under section 1983

> for the behavior of his or her subordinates if (1) the behavior of such subordinates results in a constitutional violation and (2) the official's action or inaction was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence *or* gross negligence amounting to deliberate indifference. An important factor in making the determination of liability is whether the official was put on some kind of notice of the alleged violations, for one cannot make a deliberate or conscious choice to act or not to act unless confronted with a problem that requires the taking of affirmative steps.

Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988) (internal quotation marks, brackets and citations omitted; emphasis in original). The requirement of an affirmative link between the behavior of a subordinate and the action or inaction of the supervisor "contemplates proof that the supervisor's conduct led inexorably to the constitutional violation." *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1st Cir. 1995).

Here, the plaintiff offers only the following evidence in support of his claim against Lewsen: (i) the Windham police receive "a great many" complaints about discharging firearms, for which the standard procedure is to respond with two officers, Lewsen Dep. at 36, 45; (ii) it is standard procedure for Windham police officers investigating such complaints to approach the shooter with their guns drawn, Tr. III at 13; (iii) the Windham police routinely load their handguns with hollow point bullets; (iv) the Windham police will inevitably encounter shooters who are possibly mentally unstable; and (v) if the Ramsdell defendants had contacted the plaintiff from a position of cover and

concealment, "as they would have done if they were properly trained," the situation would have ended peacefully, Affidavit of Melvin L. Tucker (Docket No. 23) ¶¶ 14-17. Plaintiff's Memorandum at 19-21. The third item in this list is not supported by the citation to the record supplied by the plaintiff and in any event is not relevant to the issue at hand. The fourth item in the list is unsupported by any citation to the summary judgment record.

I have already concluded that the Ramsdell defendants are entitled to summary judgment because they did not commit a constitutional violation in this case. That conclusion alone mandates the entry of summary judgment for Lewsen on this claim. *Lipsett*, 864 F.2d at 902. Even if that were not the case, however, the plaintiff has failed to provide any evidence that Lewsen was put on notice of any violations of the Fourth Amendment through the use of guns by his subordinates prior to the incident involving the plaintiff, *id*., or that any act or omission by Lewsen led inexorably to the shooting of the plaintiff by one of the Ramsdells, *Hegarty*, 53 F.3d at 1380. For these reasons as well, Lewsen is entitled to summary judgment on Count III.

2. The State-Law Claims (Counts IV & VI). Count IV of the amended complaint alleges that Lewsen is liable to the plaintiff for negligence in the training and supervision of the Ramsdell defendants. This claim is also covered by the immunity granted to governmental employees by the Maine Tort Claims Act in 14 M.R.S.A. § 8111(1)(C). Supervision of employees falls within the scope of discretionary duties under this statute. *Bowen v. Department of Human Servs.*, 606 A.2d 1051, 1055 (Me. 1992). Decisions concerning training of subordinates are also discretionary acts for which the statute provides immunity. *Erskine v. Commissioner of Corrections*, 682 A.2d 681, 686 (Me. 1996). Lewsen is entitled to summary judgment on Count IV.

Count VI asserts a claim against Lewsen under the Maine Civil Rights Act "on the same basis

that [he is] liable under the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983." Amended Complaint ¶ 42. Because Lewsen has no liability under section 1983, this claim also fails. Lewsen is entitled to summary judgment on Count VI.

C. Defendant Town of Windham

1. The Federal Claims (Counts II & III). The plaintiff alleges in Count II of the amended complaint that the defendant town is liable to him under section 1983 due to a policy of deliberate indifference to the constitutional rights of citizens situated similarly, including a failure to train its police officers in the appropriate use of deadly force and inadequate supervision of its police. Count III appears to reiterate this claim, specifying the town manager as the relevant policy-making official. Amended Complaint ¶ 39. When a court finds that the challenged police conduct did not violate a plaintiff's constitutional rights, any claim based on an allegation of municipal custom arising out of the same events is moot. *Willhauck v. Halpin*, 953 F.2d 689, 714 (1st Cir. 1991). In addition, "[i]t follows ineluctably that where there are no constitutional violations by municipal employees there can be no claim of inadequate supervision or training against a municipal employer." *Id*. Accordingly, the town is entitled to summary judgment on Counts II and III.

2. The State-Law Claims (Counts V & VI). Count V of the amended complaint asserts that the defendant town is liable to the plaintiff on a theory of "vicarious corporate liability" for the negligence of the individual defendants. The town, interpreting this claim as one of *respondeat superior* liability, correctly points out that such a theory is unavailable under Maine tort law, citing *Fournier v. Joyce*, 753 F. Supp. 989, 992 (D. Me. 1990). The plaintiff responds that "respondeat superior liability applies if the immunities [created by the Maine Tort Claims Act] are waived by the procurement of liability insurance," Plaintiff's Memorandum at 23, citing *Rippett v. Bemis*, 672 A.2d

82, 88-89 (Me. 1996). *Rippett* does provide that a supervisor (in that case, a sheriff) "waives his immunity from vicarious liability for his supervisory functions to the extent of" the insurance coverage provided by liability insurance covering such liability.[6] *Id*. at 89. However, the decision makes no mention of possible vicarious municipal liability. This is an issue that does not require resolution, in any event, because no tort allegations against the individual defendants remain viable in this action, and there is thus nothing for which the defendant town could bear vicarious liability. The town is entitled to summary judgment on Count V.

Count VI asserts that the town defendant is liable under the Maine Civil Rights Act "on the same basis that [it is] liable under the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983." Amended Complaint ¶ 42. As is the case with the other defendants, the town is not liable to the defendant on any such claim. Therefore, it cannot be liable to the plaintiff on Count VI of his complaint.[7]

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED**.

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[6] The plaintiff correctly points out that a governmental entity claiming immunity under the Maine Tort Claims Act bears the burden of proving that it has not waived that immunity by procuring liability insurance pursuant to 14 M.R.S.A. § 8116, *Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1489 (D. Me. 1992), and that the defendant town has failed to provide any evidence on this point. There is no surviving tort claim against the town, however, so it does not need to claim the statutory immunity and its failure to provide such evidence is irrelevant.

[7] The defendants argue at some length that the plaintiff is not entitled to declaratory and injunctive relief. Defendants' Motion at 13-14. The amended complaint does not seek such relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of August, 1998.

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David M. Cohen
United States Magistrate Judge